Nos. 17-1717 & 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, ET AL.
Petitioners,

v.

AMERICAN HUMANIST SOCIETY, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
Petitioner,

v.

AMERICAN HUMANIST SOCIETY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF LIEUTENANT COLONEL KAMAL S. KALSI, D.O., AS AMICUS CURIAE SUPPORTING PETITIONERS

Tejinder Singh
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
AMICUS CURIAE BRIEF 1
INTEREST OF THE AMICUS 1
SUMMARY OF ARGUMENT 2
ARGUMENT 4
I. The Establishment Clause Does Not Require Petitioners to Take Down the Peace Cross. 4
II. Existing Establishment Clause Tests Best Protect Religious Freedom in a Pluralistic Society 6
CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Engel v. Vitale,
370 U.S. 421 (1962) 8

Everson v. Bd. of Ed. of Ewing Twp.,
330 U.S. 1 (1947) 7

Lee v. Weisman,
505 U.S. 577 (1992) 8

Lemon v. Kurtzman,
403 U.S. 602 (1971) 2, 4, 6, 7

Lynch v. Donnelly,
465 U.S. 668 (1984) 8

McCreary Cty., Ky. v. ACLU of Ky.,
545 U.S. 844 (2005) 7, 8

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 8

Van Orden v. Perry,
545 U.S. 677 (2005) 4, 6, 7

Other Authorities

Michael Balsamo, *FBI Report Shows 17 Percent Spike in Hate Crimes in 2017*,
Associated Press (Nov. 13, 2018),
https://www.apnews.com/
e5e7bb22f8474408becd2fcdc67f284e 9

Robert P. Jones & Daniel Cox, America's
Changing Religious Identity (2017) 7

Southern Poverty Law Center, *The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation's Schools* (2016) 9

AMICUS CURIAE BRIEF[1]

Lieutenant Colonel Kamal S. Kalsi, D.O., respectfully submits this amicus curiae brief in support of petitioners.

INTEREST OF THE AMICUS

Lieutenant Colonel Kalsi is an officer in the United States Army, an emergency room physician, and the first Sikh member of the armed forces to serve on active duty with a turban, beard, and unshorn hair in more than twenty years. He was awarded the Bronze Star, the fourth-highest combat award in the armed forces, for his service in Afghanistan in 2011, and he has been an advocate for the rights of Sikh Americans both in and out of uniform.

Lieutenant Colonel Kalsi knows firsthand the importance of religious freedom and the effort it takes to secure it. In 2009, after serving for eight years in the U.S. Army Reserves, Lieutenant Colonel Kalsi volunteered for active duty. He was told that in order to serve, he would have to shave his beard, cut his hair, and stop wearing his turban—articles of faith that he had maintained for years. Lieutenant Colonel Kalsi ultimately obtained an accommodation, but only after an exhaustive process which included, among other efforts, fifty Congressional signatures on a letter to the Secretary of Defense, 15,000 petitioner signatures on a

---

[1] This brief is filed with the consent of all parties, reflected in blanket consent letters filed with the Court. Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for the amicus made any monetary contribution toward the preparation and submission of this brief.

similar letter, and the assistance of a law firm and a civil rights organization.

After that exemption was granted, the Army continued to maintain that Sikhs were required to relinquish their articles of faith in order to serve, unless they received individual exemptions. Lieutenant Colonel Kalsi worked with the military and other partners to resolve this issue, and in January 2017 the Army altered its uniform policy to more easily accommodate religious expression by uniformed soldiers. Lieutenant Colonel Kalsi continues to advocate for Sikhs and members of other religious minority groups seeking accommodations in the Army and other branches of the military.

As an American, a soldier, and a Sikh, Lieutenant Colonel Kalsi understands quite well the intersecting issues in this case. Having been to war, he understands the importance of honoring the military and fallen soldiers. He also knows firsthand what it is like to engage with American society as a member of a highly visible religious minority group that has faced bigotry and discrimination—but also found grace and accommodation.

SUMMARY OF ARGUMENT

This Court should hold that the Establishment Clause does not require petitioners to take down the Peace Cross. The Court should decline, however, to overrule *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or to adopt a new, narrower constitutional test for Establishment Clause claims generally.

For a number of case-specific reasons, the Establishment Clause does not require petitioners to take down the Peace Cross. There is a credible

argument that when the cross was erected in 1925, it was for a secular purpose—but, in any event, it was unobjectionable at the time because private religious displays do not raise Establishment Clause concerns. The government came to maintain the cross only decades later, for bona fide secular purposes related to public safety. Since that time, the cross has not been used for religious ceremonies, and the context around the cross belies any religious endorsement. The fact that the cross stood for almost a century before anybody challenged it is also significant. A reasonable observer who knew all the facts would not regard the Commission's ongoing maintenance of the cross as an endorsement of Christianity over other faiths. On the other hand, the razing of a venerable monument would likely cause more harm than good—and courts should not blind themselves to the practical consequences of their Establishment Clause rulings.

That same attention to practical consequences means that the Court should not here revisit its Establishment Clause jurisprudence. The Establishment Clause protects religious freedom by preventing the majority from using its superior numbers and political strength to commandeer state resources toward sectarian ends, relegating religious minorities to second-class status. Current Establishment Clause standards fulfill that purpose by requiring the government to consider the effects of its actions and to account for how they are likely to be perceived, *i.e.*, whether a reasonable person would perceive them as endorsing or disparaging a religion. A narrower standard that eschews such consideration and focuses only on coercion would open the door to sectarian endorsements that will aggravate religious

tensions and needlessly divide Americans. It will also—perhaps inadvertently, but inevitably—privilege the majority over minorities, at a time when many minority groups are already being told that they are not fully American. This Court should not countenance that result, let alone facilitate it, especially because there is no need whatsoever to revisit current Establishment Clause standards in order to resolve this case.

ARGUMENT

I. The Establishment Clause Does Not Require Petitioners to Take Down the Peace Cross.

Although petitioners give significant attention to the appropriate legal standard for this case, both petitioners also argue—quite correctly—that the Commission's ongoing maintenance of the Peace Cross is constitutional under the *Lemon* test, the endorsement test, and the reasoning given in Justice Breyer's concurring opinion in *Van Orden v. Perry*, 545 U.S. 677 (2005), which looks to the purpose of the Establishment Clause and the context around a display to determine whether it violates the First Amendment. *See* Am. Legion Br. 57-61; Commission Br. 33-44, 54-58. These tests have, in the past, governed cases with indistinguishable facts. Because petitioners are correct that the Peace Cross passes these tests, and because that is the narrowest ground on which this case can be correctly resolved, the Court should rule on that basis.

The facts of this case make it a relatively easy one. The Peace Cross was erected in 1925, almost a century ago, to honor men from Prince George's County who died in World War I. Pet. App. 3a-5a. The original builders were the soldiers' families and neighbors, and the cross was finished by the Snyder-Farmer Post of the

American Legion—a private organization—on land conveyed to the American Legion by the Town of Bladensburg. Pet. App. 4a; JA1058. The cross certainly had religious connotations, but also mirrored the most common grave marker used in overseas cemeteries for World War I dead, and therefore had an additional, non-religious meaning, too. The monument includes multiple secular features, and sits in a park alongside other monuments to veterans. Pet. App. 6a-7a; JA891-899; JA986-87. Thus, there is a cogent argument, advanced forcefully by petitioners, that the purpose of the Peace Cross has always been secular, its shape notwithstanding—and that the community has regarded it as a secular monument to the war, as opposed to an endorsement of Christianity. *See* Am. Legion Br. 9; Commission Br. 12-13.

In any event, when the Commission took over maintenance of the cross in 1961, it did so for apparently secular reasons: to maintain public safety as the surrounding roads were widened. Pet. App. 5a; *id.* 59a-60a. There is no indication that the Commission's intent was to endorse Christianity, and none of the Commission's routine maintenance activities since then have left that impression. Indeed, no religious ceremonies have taken place at the cross site while the Commission has maintained it (and even before then, such ceremonies were exceedingly rare, if they happened at all).

Even more telling, nobody challenged the legality of the Peace Cross until 2012. JA1443. In light of the Peace Cross's long and largely uncontroversial history, it is difficult to argue that it sows the sort of divisiveness that the Establishment Clause seeks to

prevent. Indeed, requiring petitioners to take down the Peace Cross is far more likely to produce that result.

As petitioners have explained, a reasonable observer considering all of these facts would not conclude that the Commission's ongoing maintenance of the Peace Cross was done for religious purposes, or constitutes an endorsement of Christianity above other faiths. Under the *Lemon* test, the endorsement test, and the rationale of the concurrence in *Van Orden*—which frame the analysis for monuments like this one—the Establishment Clause therefore does not require petitioners to dismantle or modify the Peace Cross, and this Court should reverse the judgment below.

II. Existing Establishment Clause Tests Best Protect Religious Freedom in a Pluralistic Society.

Although the Court should rule in petitioners' favor, it should decline to reinvent Establishment Clause jurisprudence by adopting a rule that prohibits only coercion or the formal establishment of religion. Instead, the Court should reaffirm the salience of existing Establishment Clause tests (the *Lemon* test, the endorsement test, and the purpose-based analysis of the *Van Orden* concurrence), which are adequate to resolve this case and also best protect religious freedom in our pluralistic society. To the extent the Court wishes to clarify which test applies to religious displays, it should do so by selecting from these currently available tests rather than adopting a new, narrower one.

The Establishment Clause serves multiple purposes. Obviously, it prevents the creation of a state religion. But the Clause has always done so much more. It prevents the government from interfering in matters

of conscience. It protects the government from religious influence. The Establishment Clause also stands as a critical bulwark against the stigmatization and marginalization of minority religions. The Clause fulfills this purpose, in part, by ensuring the government's neutrality among religious sects. *See, e.g.*, *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (1947). The Clause's role in the protection of religious minorities is more important today than ever before, as American society is growing rapidly more religiously diverse.[2]

In recognition of these important purposes, this Court has applied tests tailored to the facts of individual cases or categories of cases. The resulting doctrine might not always be clear or elegant. But it works: despite their sometimes-fuzzy and sometimes-thorny edges, the tests enshrined in this Court's precedents fulfill all of the Establishment Clause's purposes. By requiring courts to consider the purpose and effects of government action, the *Lemon* test, the endorsement test, and the *Van Orden* concurrence protect religious freedom, good government, and minority rights.

A rule that prohibits only coercion, on the other hand, cannot address the danger that the majority will, through government endorsements of its own faith,

---

[2] Robert P. Jones & Daniel Cox, America's Changing Religious Identity 10 (2017), *available at* https://www.prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf ("The American religious landscape has undergone dramatic changes in the last decade and is more diverse today than at any time since modern sociological measurements began.").

marginalize minority groups. As this Court has recognized, government endorsements of religion send a message that nonadherents "are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Indeed, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). This harm does not require direct coercion—and "[t]he Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion." *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring and collecting cases).

Some are tempted to respond that listeners—even members of vulnerable minority groups—have no constitutional right not to hear speech that upsets them. They argue that the solution to offensive government speech is simply not to listen. But the problem is not only that government endorsements of a religion injure or offend nonadherents. The more significant problem is that government endorsements of religion embolden private parties to discriminate against nonadherents. "In the marketplace of ideas, the government has vast resources and special status," and when it speaks, people listen. *McCreary Cty.*, 545 U.S. at 883 (O'Connor, J., concurring). Thus, when politicians send the message that the United States is a Christian nation, anti-Semitism flares. When the

government disparages Muslims, the people do, too. The resulting injuries are not abstract: reported hate crimes against religious minorities are on the rise, as is school bullying based on religion. *See* Michael Balsamo, *FBI Report Shows 17 Percent Spike in Hate Crimes in 2017*, Associated Press (Nov. 13, 2018), https://www.apnews.com/e5e7bb22f8474408becd2fcdc67f284e (reporting "a nearly 23 percent increase in religion-based hate crimes, with more than 900 reports of crimes targeting Jews and Jewish institutions"); Southern Poverty Law Center, *The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation's Schools* (2016), https://www.splcenter.org/20161128/trump-effect-impact-2016-presidential-election-our-nations-schools (reporting, based on a survey of over 10,000 educators from across the country, a notable uptick in anti-Muslim sentiment and bullying after the 2016 election, among other racist and xenophobic incidents). Minorities cannot save themselves from these effects by turning away.

To be quite clear, amicus is not arguing that the government's conduct is the sole or even the primary cause of sectarian division or violence. Plainly, these problems are complex and multifaceted. Nor does amicus argue that every religious display or accommodation inevitably fosters such strife. The maintenance of the Peace Cross, for example, does not promote divisiveness. Nor does the use of religious symbolism on gravestones at Arlington Cemetery. Nor do accommodations for religious practice under statutes like the Religious Freedom Restoration Act. That is why the Establishment Clause does not prohibit those government actions under any test this Court has adopted.

But none of that changes what we all know to be true: the government's endorsements of religion can contribute to religious divisiveness, even when those actions are not directly coercive. When that happens, minorities face discrimination and our whole society suffers as the ideals of freedom and inclusion that we have fought to preserve give way to sectarianism and division. This Court has long recognized that fact, and has correctly interpreted the Establishment Clause to protect the people from those effects by preventing government endorsements or disparagements of religion. That protection is essential in a pluralistic society, and this Court should maintain it vigorously.

Finally, it is worth recognizing that this Court's decisions can have profound symbolic effects. Obviously, amicus does not speak for all religious minorities. But based on many years of experience working hard in this field, amicus believes that many members of religious minority groups would be alarmed if this Court breaks with its Establishment Clause precedents to adopt a narrow, coercion-based test. Minorities often look to the courts for protection from the whims of the majority. This Court's long history of protecting religious freedom also acts as a backstop that makes governments receptive to arguments in favor of freedom and fairness. If this Court undermines those protections—in a case where it does not have to—the symbolic effect would be every bit as jarring as the razing of the Peace Cross. This Court should instead maintain its leadership by allowing both the cross and the Court's own well-settled precedents to stand.

CONCLUSION

By application of settled law, the decision below should be reversed.

Respectfully submitted,

Tejinder Singh
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

December 26, 2018